



(3) Did the Administrative Law Judge exceed the scope of his authority when he ordered that the treatment be provided by an orthopedist and specifically when he ordered that an MRI be provided?

(4) Claimant has, on the other hand, moved to dismiss the appeal on the grounds that the Appeals Board is illegally constituted in violation of the Constitution of the State of Kansas and the United States Constitution.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1) The Appeals Board finds that the decision of the Administrative Law Judge ordering temporary total disability benefits was within his jurisdiction and therefore not subject to review. Pursuant to K.S.A. 44-551, a review by the Appeals Board is not to be conducted from a preliminary order unless it is alleged that the order exceeded the Administrative Law Judge's jurisdiction. K.S.A. 44-534a specifies certain issues as jurisdictional. A finding that the claimant is or is not temporarily totally disabled is not one of those issues considered jurisdictional. The Administrative Law Judge did have jurisdiction to enter the order for temporary total benefits and that order is, therefore, not reviewable by the Appeals Board.

(2) As in the case of a finding that the claimant is temporarily totally disabled, the finding made by the Administrative Law Judge that the previous medical care was unsatisfactory is not one listed in the Workers Compensation Act as a jurisdictional finding. See K.S.A. 44-534a. The Administrative Law Judge did have jurisdiction to order a change in physicians and the Appeals Board will not review that order.

(3) Under the circumstances presented here, the Administrative Law Judge can order that the treatment be by an orthopedic physician. The Appeals Board understands that portion of the Administrative Law Judge's Order relating to the MRI to be authorization for an MRI, and with that understanding affirms the decision of the Administrative Law Judge.

First, the Appeals Board finds the Administrative Law Judge does have, under the circumstances presented here, authority to direct that the care be provided by an orthopedic physician. The neck and shoulder complaints presented by claimant are ones often treated by an orthopedic physician and the Appeals Board considers the Administrative Law Judge to have the discretion to determine that appropriate medical care requires the expertise of an orthopedic physician.

Respondent has also, in its appeal, objected to that portion of the preliminary order which might be understood to require that the physician selected perform an MRI. The Appeals Board generally agrees with respondent's contention that the Administrative Law Judge cannot dictate the nature of treatment or testing to be performed by the authorized treating physician. In this case that physician had not yet been chosen at the time the order was entered. However, in this case, an orthopedic surgeon has already recommended that an MRI be performed. Under these circumstances it is quite appropriate for the Administrative Law Judge to have indicated in his order that an MRI is authorized and will be provided at the respondent's expense if the authorized treating physician does consider it to be appropriate.

Under the circumstances, the Appeals Board understands and interprets the decision by the Administrative Law Judge as one which expresses his desire to see the results of the MRI for his purposes in rendering decisions in this case. It is, however, also understood and interpreted as authorization for one to be performed at respondent's

expense if the yet to be named physician deems it appropriate, and not as direction of the care the physician is to provide. With this understanding, the decision by the Administrative Law Judge will not be modified by the Appeals Board. In the event the named physician does not deem an MRI appropriate, the Administrative Law Judge may, of course, under K.S.A. 44-516 order the test be performed under the direction of Dr. Delgado as an independent or neutral medical examiner.

(4) Claimant's motion to dismiss is denied.

Claimant has moved to dismiss this appeal contending the Appeals Board is illegally constituted in violation of the Kansas Constitution and the United States Constitution. Constitutionality is presumed with all doubts resolved in favor of its validity before the statute may be stricken. Blue v. McBride, 252 Kan. 894, 850 P.2d 852 (1993). The Appeals Board is performing its duties pursuant to statute lawfully enacted by the Kansas Legislature and signed into law by the Governor. Until such time as a court of competent jurisdiction rules that the presumption of constitutionality has been overcome, the Appeals Board will continue to carry out those responsibilities. Claimant's motion is, therefore, denied.

#### **AWARD**

**WHEREFORE**, the decision of the Administrative Law Judge remains in effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: George H. Pearson, 3401 SW Harrison, Suite 104, Topeka, Kansas 66611  
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